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No. 05-1421

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In the Supreme Court of the United States

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., AND LOBERG EXCAVATING, INC., PETITIONERS,

v.

JACK LAVIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993) (*Boston Harbor*), this Court held that the National Labor Relations Act (the NLRA) preempts only "market *regulation*," and only in certain circumstances. *Id.* at 227 (emphasis in original). The Court ruled that a local government's requirement that contractors comply with a project labor agreement (PLA) on a construction project was not "market regulation" because the NLRA would permit a private party to require a PLA, and the PLA was tailored to the government's interest in quick, cost-effective completion of its project by skilled workers. Here, the Seventh Circuit held that the Illinois Renewable Fuels Program Development Act (the Act) (20 ILCS 689/1 *et seq.* (2004)), which conditions a grant of construction funds for an alternative fuel facility on the grantee's agreement to use a PLA for that construction, is not "market regulation."

The questions presented are:

1. Whether the Act's grant condition constitutes "market regulation" within the meaning of *Boston Harbor*.

2. If so, whether the Act either falls within the National Labor Relations Board's exclusive authority to implement the NLRA, and thus is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*), or thwarts the play of market forces between labor and management that Congress intended to be free from *all* government regulation, and thus is preempted under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*).

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BRIEF IN OPPOSITION

This Court's review is not necessary either to secure and maintain uniformity of this Court's decisions or to resolve any circuit conflict.

The Seventh Circuit's conclusion that the Illinois Renewable Fuels Development Program Act (the Act) (20 ILCS 689/1 *et seq.* (2004)) is not "market regulation" is fully consistent with *Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993) (*Boston Harbor)* and National Labor Relations Act (NLRA) preemption rulings from the Third and District of Columbia Circuits. Indeed, the opposite conclusion would have created a conflict with *Boston Harbor* and its progeny – it would mean that to condition a grant of state funds on the grantee's use of a PLA for construction at the grantee's facility is "market regulation," even though the NLRA permits private employers in the construction industry to use PLAs and even when the condition is specifically tailored to the State's interest in efficient, skilled, and cost-effective construction of a funded facility that will improve the environment. The Seventh Circuit avoided, not created, a circuit conflict.

In addition, though they fault the Seventh Circuit for referring to federal spending cases, petitioners' purported circuit conflict relies on opinions from the Second, Fifth, and Ninth Circuits that do not concern NLRA preemption. These cases also do not conflict with the Seventh Circuit's analysis. As for petitioners' insistence that there is an intra-circuit conflict, the Seventh Circuit's rejection of petitioners' petition for rehearing en banc, without a single vote in favor, indicates that there is none.

Another reason to deny the petition is that it would make no difference in the outcome here even if the Act were "market

regulation." The Act does not fall within either the zone of the NLRB's exclusive authority to implement the NLRA (for preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*)) or the zone for the play of market forces free from *all* government regulation (for preemption under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*)). In fact, as *Boston Harbor* teaches, a PLA does not "regulate" market forces, it "exemplifies" them. 502 U.S. at 233. Accordingly, the Act would not be preempted even if it were "market regulation."

STATEMENT

A. The Illinois Renewable Fuels Development Program Act (the Act) (20 ILCS 689/1 *et seq.* (2004)) created a grant program that is administered by the Illinois Department of Commerce and Economic Opportunity, of which respondent Jack Lavin is the Director. 20 ILCS 689/15, 689/20 (2004) (Pet. App. 15a-16a). Under the Act, construction grants totaling no more than $15,000,000 annually (assuming an appropriation has been made) are given to those who own or operate an alternative fuel facility of a certain size, if the grant recipient agrees to enter into a PLA for the construction. 20 ILCS 689/15(a), 689/20 (2004) (Pet. App 16a-17a); 32 Ill. Admin. Code §§ 130.20, 130.50.

Contrary to petitioners' characterization of the Act as "broad and general" and "fraught with ambiguity as to the scope, coverage, and parties to any PLA" (Pet. 11, 14), the Act and its regulations are forthright. The PLA must establish the minimum compensation and benefits for each class of labor organization employees, and must prohibit them from engaging in strikes or labor disputes. 20 ILCS 689/25 (2004) (Pet. App. 16a-17a); 32 Ill. Admin. Code § 130.60. The regulations further specify that a PLA must (1) set forth mutually binding

procedures for resolving jurisdictional labor disputes and grievances that arise before the work is completed; (2) permit the selection of the most qualified lowest responsible bidder, without regard to its non-union or union status at other construction sites; and (3) bind all contractors and subcontractors on the project through the inclusion of appropriate bid specifications. 32 Ill Admin. Code § 130.60.

Although petitioners insist that the only state interests underlying the Act are air quality and agriculture (Pet. 3), the Act's implementing regulations describe the state interests that the Act's PLA grant condition further:

> [w]hen awarding public funds for public works projects, the State of Illinois has a compelling interest in ensuring that the highest standards of quality and efficiency are applied to the project. *[PLAs] provide the State of Illinois with a guarantee that specific public works projects will be completed with highly skilled workers, and also function as a means to provide for peaceful, orderly and mutually binding procedures for resolving labor issues.*

32 Ill. Admin. Code § 130.10 (emphasis added). In addition, when signing the Act into law, the governor explained that the PLA "ensur[ed] the most efficient use of State funds." www.ilga.gov/legislation/93/hb/PDF/09300HB0046gms.pdf.

B. Petitioner Northern Illinois Chapter of Associated Builders and Contractors, Inc. (ABC), is an association of construction contractors and related firms, of which petitioner Loberg Excavating, Inc., is a member. Pet. App. 1a. They sued Director Lavin, alleging that to require a grantee's subcontractors to enter into a PLA violates their federal right not to do so and that the Act's PLA requirement deterred them from bidding on a project for which a grant had been sought. Pet. App. 10a.

Contrary to petitioners' assertion that judgment was entered on cross-motions for summary judgment (Pet. 5), the district court granted respondent's motion to dismiss the case with prejudice for failure to state a claim, finding that the Act was not "market regulation" for *Boston Harbor* purposes. Pet. App. 9a-12a. The district court concluded that Illinois did not have to be the owner of a subsidized facility for its conduct to fall outside the NLRA's preemptive scope, reasoning that "'[t]he [g]overnment unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." Pet. App. 11a-12a (quoting *Bldg. & Constr. Trades Dept. AFL-CIO v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002)). The district court found no difference, for *Boston Harbor* purposes, between a government's acts as a lender or benefactor and its acts as an owner, observing that "'a private lender or benefactor also would be concerned that its financial backing was used efficiently.'" Pet. App. 12a (quoting *Allbaugh*, 295 F.3d at 35). Because the Act's PLA condition applied only to projects funded thereunder, the district court concluded, Illinois was "acting for a proprietary rather than regulatory purpose," so the NLRA did not preempt the Act. *Ibid.*

C. The Seventh Circuit unanimously affirmed, holding that the Act was not "market regulation" for purposes of *Boston Harbor*. Pet. App. 1a-6a. After noting that the NLRA permits PLAs in the construction industry, the court addressed a semantic issue, stating that Illinois was not a "proprietor" because it did not own the funded facilities. Pet. App. 2a. It also observed that, under the Act, Illinois neither hired the contractors nor invested in the facilities through bonds. *Ibid.* (distinguishing *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1944 (2005)). The court cautioned, however, that the *Boston Harbor* inquiry could not be resolved merely by concluding that a State's conduct was

not "proprietary," stressing that *Boston Harbor* did not exclude only "proprietary" acts from the NLRA's preemptive scope. Pet. App. 3a (citing *Boston Harbor*, 507 U.S. at 226-27).

The Seventh Circuit then reiterated *Boston Harbor*'s rule that the NLRA only "'prevents a State from *regulating* within a protected zone, whether it be a zone protected and preserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 226-27) (emphasis added). The court thus reasoned that "'the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 226-27) (emphasis in *Boston Harbor*). Therefore, the court concluded, "[t]he need to distinguish regulation from other governmental activity is the Court's theme in *Boston Harbor*." *Ibid.*

The Seventh Circuit then asked whether the Act's conditional offer of a grant was "market regulation" for *Boston Harbor* purposes and concluded it was not, stressing that "Illinois does not seek to affect labor relations generally." *Ibid.* The court found significant that a grantee could decline the funding and that, even if funding were sought and obtained for a particular facility, "[b]oth labor and management are free to make independent decisions with respect to all activities other than those for which the state pays." *Ibid.* The court distinguished between regulating commerce and acting in commerce, explaining that to confiscate the right of owners and contractors to avoid unions would be "regulation," whereas to offer a monetary incentive to relinquish that right would not. Pet. App. 5a.

Observing that courts are frequently asked to decide if a grant condition is a regulation, the Seventh Circuit stated that "the answer almost always is negative," illustrating its point with cases concerning conditional federal grants to individuals and state and local governments. Pet. App. 3a-4a (citing *Printz*

v. United States, 521 U.S. 898 (1997); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Rust v. Sullivan*, 500 U.S. 173 (1991); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); and *Buckley v. Valeo*, 424 U.S. 1, 57 & n.65 (1976)). The court acknowledged, however, that a condition on funding may be a "regulation" if it affects employer conduct other than on a financed project. Pet. App. 4a (citing *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986), which struck down (under *Garmon*) a state statute barring business with vendors who repeatedly violated the NLRA because its effect was to control employer behavior generally, and *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), which struck down a county purchasing rule that prescribed how employers must handle labor relations in all aspects of their business).

Although petitioners insist that the Seventh Circuit's ruling eviscerates federal labor law by "showering benefits" on political supporters and make much of the Seventh Circuit's speculation that a purpose of the Act was "likely" to assist organized labor (Pet. 8, 14 (citing Pet. App. 5a)), the court also warned that "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." Pet. App. 5a (emphasis in original).

D. Petitioners filed a petition for rehearing en banc, which was denied without a single vote in its favor. Pet. App. 7a.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari.

Labor law preemption principles have been called Delphic (*International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958)), but *Boston Harbor* made one thing crystal clear:

NLRA "preemption doctrines apply only to 'state *regulation.*'" 507 U.S. at 227 (emphasis in original). *Boston Harbor* held that because the NLRA would not prohibit a private employer in the construction industry from using a PLA, and because the government's PLA requirement there was tailored to its interest in efficient and cost-effective construction of its project, the PLA there was not "market regulation." *Id.* at 230-33.

Here, the Seventh Circuit correctly applied *Boston Harbor*'s bright-line test when it concluded that the Act is not "market regulation." Because the Seventh Circuit's opinion is in harmony with *Boston Harbor* and its NLRA preemption progeny in federal appeals courts, and because the opposite conclusion would have conflicted with those rulings, this Court's review is not warranted. Likewise, no inter- or intra-circuit conflict exists that requires this Court's attention. In addition, the Seventh Circuit's mention of federal spending cases is not tantamount to the creating of a new "market regulation" test for NLRA preemption. Moreover, reversal of the Seventh Circuit's opinion would make no difference in the outcome – even if the Act were "market regulation," it neither infringes on the NLRB's exclusive authority to implement the NLRA nor thwarts the free play of market forces. Thus, it does not fall within the preemptive scope of, respectively, *Garmon* or *Machinists*.

I. The Seventh Circuit's Holding That the Act Is Not "Market Regulation" Is Fully Consistent With *Boston Harbor* and Federal Reviewing Courts' Opinions on NLRA Preemption.

Petitioners insist that by holding that the Act is not "market regulation," the Seventh Circuit created "a new and unprecedented exemption from NLRA preemption beyond the previously limited scope of market participation" under *Boston Harbor* and its progeny and "invented a new and erroneous

test" for "market regulation." Pet. 7-14. They misunderstand *Boston Harbor*'s analytical framework.

A. The Seventh Circuit's Conclusion that the Act Is Not "Market Regulation" Fits Squarely Within *Boston Harbor*'s Two-Part Analytical Framework.

Boston Harbor's "market regulation" test for NLRA preemption is straightforward: government conduct is not "market regulation" when it is analogous to a private party's conduct in the marketplace under the NLRA and is tailored to the government's interest. 507 U.S. at 231-32. Here, as the Seventh Circuit noted, the NLRA permits PLAs in the construction industry. Pet. App. 2a. Furthermore, the governor's message and related regulations explained the State's interest in the Act's PLA grant condition: to ensure efficient use of state funds, by guaranteeing highly skilled workers, predictable labor costs, and labor peace, which in turn will expedite construction of these highly technical facilities. www.ilga.gov/legislation/93/hb/PDF/09300HB0046gms.pdf; 32 Ill. Admin. Code § 130.10. Plainly, the Seventh Circuit believed that the Act is specifically tailored to this interest, for it found significant that the Act's PLA requirement applies only to a grantee's facility and thus "does not affect people who spurn the state's largesse" and leaves labor and management free to refuse to use a PLA on all other projects. Pet. App. 5a, 3a.

This reasoning is fully consistent with *Boston Harbor*, which emphasized that the PLA bid specification there permitted contractors who normally do not enter into such agreements to choose between continuing to do business that way or to change their usual mode of operation to obtain the job. 507 U.S. at 231. Thus, the Seventh Circuit's conclusion that the Act is not "market regulation" does not conflict with *Boston Harbor*'s two-step analytical framework.

Rather, it is petitioners' starting and ending premise – that the scope of the NLRA's market participation exception is "limited" and "narrow" (Pet. 7, 14) – that conflicts with *Boston Harbor*, and in several ways. It conflicts with *Boston Harbor*'s recognition of "the basic assumption that Congress did not intend to displace state law." 507 U.S. at 224. It also conflicts with *Boston Harbor's* narrow definition of the NLRA's preemptive scope: "the NLRA was [not] intended to supplant . . . all legitimate state activity that affects labor," and even state "regulation" is preempted only under *Garmon* or *Machinists*. *Id.* at 226-27. Likewise, petitioners' concern that the Seventh Circuit's opinion sounds the death knell for federal labor law (Pet. 8, 14) conflicts with *Boston Harbor*'s recognition that a State's conduct is not necessarily "regulation" even when "influenced by labor considerations." 507 U.S. at 229 (citing *Gould*, 475 U.S. at 291).

In sum, the Seventh Circuit's opinion is consistent with *Boston Harbor*'s analysis and the presumption against preemption. Petitioners' view is not.

B. The Seventh Circuit's Opinion Creates No Conflict With the Fifth Circuit's Opinion in *Cardinal Towing*.

Petitioners also contend that the Seventh Circuit's opinion conflicts with *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999), and its progeny in the Second and Ninth Circuits, none of which concern NLRA preemption. Pet. 8-9. By doing so, they imply that the NLRA's has no preemptive effect only when the government is the owner ("proprietor") of the construction project using a PLA and, even then, only if certain specific findings are made. *Ibid.* Not so.

1. To Hold that a Government's PLA Grant Condition Is "Market Regulation" Unless the Government Owns the Construction Project Would Create an Inter-Circuit Conflict.

Petitioners' insistence that the Act's PLA requirement is "market regulation" because Illinois does not own the facility is a semantic error. *Cardinal Towing*, which concerned preemption by a federal motor carrier law that explicitly preempted any "'law, regulation, or other provision having the force and effect of law'" (180 F.3d at 690-91 (quoting 49 U.S.C. § 14501(c)(1)), did not hold that the government regulates unless it is acting as an owner. Rather, the Fifth Circuit broadly defined "proprietary" conduct as "actions taken to serve the government's own needs rather than those of society as a whole." 180 F. 3d at 691. Thus, *Cardinal Towing*'s broad definition of "proprietary" conduct includes all government action that serves the government's own needs. This mirrors the Seventh Circuit's caution that the government's conduct as an owner is merely one way, not the only way, in which its conduct is not "regulation." Pet. App. 3a. As the Fifth Circuit explained, the distinction between the regulatory and non-regulatory conduct is merely "*most readily apparent* when the government purchases goods and services its operations require on the open market." 180 F.3d at 691.

Furthermore, *Cardinal Towing*'s reasoning is identical to that of the Seventh Circuit. There, the Fifth Circuit held that an ordinance directing that non-consensual towing of certain cars from public streets be handled under one contract was not a regulation because its "limited scope . . . decisively foreclose[d] an inference that the City sought to change the tow truck industry as a whole, let alone influence society at large." *Id.* at 694. Likewise, the Seventh Circuit's holding that the Act applies only to construction work at a funded facility means that the statute's limited scope decisively forecloses any inference

that Illinois sought to affect labor relations generally, as the Seventh Circuit explicitly concluded. Pet. App. 3a.

Furthermore, it is petitioners' broad definition of "market regulation," which includes everything except the government's acts as an owner or direct purchaser of goods and services, that directly conflicts with *Cardinal Towing*. It also conflicts with two federal appellate court opinions addressing NLRA preemption that the Seventh Circuit cited but petitioners do not mention: *Building and Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003), and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). Had the Seventh Circuit adopted petitioners' view, the result would have created an inter-circuit conflict.

In *Allbaugh*, the D.C. Circuit flatly rejected as irrelevant for *Boston Harbor* purposes a purported distinction between the government's actual ownership of a project and its funding for it, characterizing the narrower definition of "proprietary" conduct as "too crabbed." 295 F.3d at 35. In doing so, the court stressed that "the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity" for *Boston Harbor* purposes. *Ibid.* For similar reasons, the Third Circuit held in *Sage Hospitality* that to condition government financing for a private party's construction project on the use of a labor neutrality agreement was not "market regulation" under *Boston Harbor*. 390 F.3d at 216-18; *see also* Roger C. Hartley, *Preemption's Market Participant Immunity – A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. Pa. J. Lab. & Empl. L. 229, 252-55 (2003) (noting that when government participates in real estate or capital markets by conditioning a grant on the use of a PLA, it protects its

investment interests by ensuring that its investment will not be wasted due to labor unrest).

Thus, petitioners' view of *Boston Harbor*'s "market regulation" test is simply wrong. *Boston Harbor* requires courts to determine whether "in placing a labor-related condition upon its award either of a construction contract *or of funds to another entity that will award the construction contract*, the Government 'acts just [as] a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find,' or instead seeks to affect conduct 'unrelated to the employer's performance of contractual obligations to the [Government].'" *Allbaugh*, 295 F.3d at 34-35 (emphasis added) (quoting *Boston Harbor*, 507 U.S. at 231-32); *see also Sage Hospitality*, 390 F.3d. at 216 (defining *Boston Harbor*'s two-step inquiry as asking if (1) "the challenged funding condition serve[s] to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier" and (2) "the scope of the funding condition is 'specifically tailored' to the proprietary interest") (citing *Boston Harbor*, 507 U.S. at 232). Significantly, one of petitioners' own authorities found "no significant difference" between the *Boston Harbor* "market regulation" test as articulated in *Cardinal Towing* and *Sage Hospitality*. *Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 16 (N.D.N.Y. 2005).

In sum, the Seventh Circuit's opinion avoided, not created, an inter-circuit split on the question of whether the government's PLA condition on funding is "market regulation" if it is not the owner of a project.

2. Even if *Boston Harbor* Required Explicit Findings of Analogous Private Conduct and Narrow Scope, the Act's PLA Grant Condition Allows Those Findings.

Petitioners also insist that "numerous decisions in other circuits" have interpreted *Cardinal Towing* and *Boston Harbor* as requiring specific findings of analogous private conduct and narrow scope to avoid NLRA preemption. Pet. 6-8. As support, however, they cite just three cases – one is a district court ruling currently on appeal, and neither of the other two is an NLRA preemption case. *Ibid.* (citing *Healthcare Ass'n*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881-82 (9th Cir. 2006); and *Sprint Spectrum L. P. v. Mills*, 283 F.3d 404, 416-21 (2d Cir. 2002)).

Petitioners imply that the Seventh Circuit did not find that the PLA required as a grant condition under the Act is analogous to the conduct of a private party (Pet. 3, 8-9, 10), yet the Seventh Circuit made this finding (Pet. App. 2a). They also insist that the Seventh Circuit could not make this finding, stating that a grantee is not an "employer in the construction industry" under Section 8 of the NLRA and thus cannot use a PLA. Pet. 9, 10. As support, they merely cite (without explanation) an NLRB determination that an operator of a chain of retail stores that was a prospective lessee was not an "employer in the construction industry." Pet. 10 (citing *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 N.L.R.B. 1224 (1964)). To the extent that petitioners narrowly define "employer in the construction industry" to mean only an owner, that view appears to conflict with the "rather expansive definition" found in more recent NLRB rulings. *Milwaukee and Southeast Wisconsin Dist. Council of Carpenters v. Rowley-Schlimgen, Inc.*, 2 F.3d 765, 767-68 (7th Cir. 1993) (citing *Los Angeles Bldg. and Constr. Trades Council (Church's Fried Chicken)*, 183 NLRB 1032, 1036 (1970), and

United Bhd. of Carpenters and Joiners of America (Longs Drug Stores, Inc.), 278 N.L.R.B. 440, 1986 WL 54111 (1986)). Under this more expansive definition, an "employer in the construction industry" is anyone who is able to determine the nature of the workers who will be employed at a construction site. *Id.* at 769. Nothing in the record here indicates that a grantee would not be able to choose who will construct its facility.

Likewise, the Seventh Circuit's ruling is consistent with the second part of the *Boston Harbor* test: the court held that Illinois does not seek to affect labor relations generally. Pet. App. 3a. This means that the Act does not affect conduct unrelated to the State's articulated interests in ensuring the efficient, effective use of its funds by requiring skilled workers, predictable costs, and labor peace. The court supported its conclusion by emphasizing the Act's limited scope: any owner that does not want to use a PLA need not seek a grant, and even if labor and management give up the right not to deal with organized labor to work on a grantee's facility, they still remain free to make independent decisions with respect to all other construction projects. Pet. App. 3a, 5a. Contrary to petitioners' characterization of the Act as a "mandate" that "forces" unwilling parties to use a PLA (Pet. 3), the Act allows owners, labor, and management to retain their right to avoid unions elsewhere. As the Seventh Circuit explained, it is merely an incentive to surrender that right voluntarily, as a condition of receiving state funds for a particular project. Pet. App. 5a.

Furthermore, neither *Olympic Pipe Line* nor *Sprint Spectrum* conflicts with the Seventh Circuit's opinion here. In *Olympic Pipe Line*, the Ninth Circuit merely held that the city's imposition of pipeline safety conditions was preempted by a federal pipeline safety statute because (1) the city owned the streets and the land beneath them as a sovereign, so its interest was not that of a private market participant that owns a pipeline

or competes in a pipeline market or related market; (2) the city acted pursuant to its regulatory, police power and its general duty to protect the public health and safety rather than in an attempt to protect its role in the real estate market; and (3) the city's executives had explicitly invoked police and regulatory powers when doing so. 437 F.3d 881-82. By contrast, for Illinois to offer a conditional grant is neither unique to sovereigns nor an exercise of the State's regulatory, police power pursuant to its general duty to protect public health and safety, and Illinois never explicitly (or implicitly) invoked its police or regulatory powers when it enacted the Act. Likewise, in *Sprint Spectrum*, the Second Circuit rejected a Telecommunications Act preemption challenge to a school district's lease condition, noting that a private landlord could impose that condition (283 F.3d at 416-21), just as a private employer in the construction industry may use a PLA. *Sprint Spectrum* thus does not conflict with the Seventh Circuit's ruling.

In sum, the Seventh Circuit's opinion is fully consistent with *Boston Harbor*'s two-part test for NLRA preemption. As the Seventh Circuit correctly held (and *Allbaugh* and *Sage Hospitality* agree), ownership is one, but only one, of the government interests relevant to the NLRA's "market participant" exception.

C. The Seventh Circuit's Opinion Creates No Conflict With *Gould* Concerning the Government's Use of Its Spending Power as a Pretext for Regulation.

Petitioners state, without elaboration, that the Seventh Circuit's opinion conflicts with the rule that the government's spending power cannot be used as a pretext for regulating labor relations. Pet. 8 (citing *Gould* and *Boston Harbor*). There is no conflict.

Gould held that Wisconsin's statutory ban against doing business with vendors who had repeatedly violated the NLRA conflicted with the NLRA's "integrated scheme of regulation" for labor law violations and thus was preempted under *Garmon*. 475 U.S. at 287- 89 & n.5. In so holding, the court rejected Wisconsin's argument that the ban was an exercise of spending power, not regulatory or police power, citing the ban's punitive effect and Wisconsin's admission that the statute's intent was to deter violation of the NLRA and to encourage compliance therewith. *Ibid.* *Gould* has no relevance here. The Act is not a ban, and it neither deters violations of the NLRA nor encourages compliance with it. Instead, as the Seventh Circuit held, the Act is not a "market regulation" because owners, labor, and management remain free to do as they like with regard to all activities other than construction on a grantee's facility.

Thus, the Seventh Circuit's opinion creates no conflict with the rule that the government may not use its spending power as a pretext for regulation. In fact, to have adopted petitioners' narrow view of the government spending power might have created a conflict with *Colfax Corp. v. Illinois State Toll Hwy. Auth.*, 79 F.3d 631 (7th Cir. 1996), in which the Seventh Circuit upheld a PLA requirement with a far broader scope – it covered *all* other facilities on which a contractor worked as a condition for working on a government project.

D. The Seventh Circuit's Rejection of Petitioners' Request for Rehearing En Banc Demonstrates That There Is No Intra-Circuit Conflict About "Market Regulation" for *Boston Harbor* Purposes.

Petitioners also claim that this Court's review is required because the Seventh Circuit's opinion here conflicts with two other Seventh Circuit rulings on NLRA preemption. Pet. 9-11 (citing *Colfax* and *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005)). An intra-

circuit conflict, however, is not a ground for this Court's attention. Sup. Ct. R. 10; *see also*, R. Stern, et al., *Supreme Court Practice*, § 4.6, at 235-36 (8th ed. 2002). Even if it were, petitioners are wrong – there is no intra-circuit conflict, as the Seventh Circuit's rejection of their petition for rehearing en banc (without a single vote in favor) makes plain.

Contrary to petitioners' view, *Colfax* did not concern a "single-project labor agreement requirement." Pet. 11. On the contrary, the Illinois Toll Authority required a contractor to become a party to an existing collective bargaining agreement that would apply to *all* of the contractor's other projects, including those in which the Authority had no interest at all, in order to work on Authority projects. 79 F.3d at 632, 634-35. Despite the broad scope of that condition, the Seventh Circuit held that it was not "market regulation," reasoning that the Authority merely had done what a private entity could do under *Boston Harbor*. *Id.* at 635. Significantly, the Seventh Circuit held that the PLA requirement in *Colfax* did not cross *Boston Harbor*'s bright line into "market regulation," even though it affected that contractor's labor relations on all other projects, because it was imposed only on contractors who worked on an Authority project. *Id.* at 634-35. The Seventh Circuit's opinion that the Act's far narrower PLA condition is sufficiently project-specific to avoid a finding of preemption is thus in accord with *Colfax*. Indeed, had the Seventh Circuit held that the Act's narrower PLA condition is a "market regulation," it would have had to overrule *Colfax*.

Similarly, there is no conflict between *Milwaukee County* and the Seventh Circuit opinion here, which explicitly *relied* on it. Pet. App. 4a. At issue in *Milwaukee County* was a county ordinance requiring that any firm with a county contract for certain services provided to county residents had to negotiate a labor peace agreement with any union that wanted to organize employees who worked on such contracts. 431 F.3d at 280.

Among other things, the ordinance required that such agreements contain a prohibition against employer conduct the NLRA protects, which meant that the ordinance unfairly favored union organizing. *Ibid.* After carefully reviewing the record on summary judgment, the Seventh Circuit held that the ordinance was "market regulation" for *Boston Harbor* purposes because the county was trying to substitute its own labor-management philosophy for that of the NLRA. *Id.* at 281. The court found "inescapable" the inference of pretext due to the "mismatch" between the county's ostensible interest in uninterrupted services and the practical effect of the labor peace agreements, which (unlike PLAs) the NLRA does not recognize. *Id.* at 281-82.

Contrary to petitioners' view (Pet. 10), the Act is sufficiently narrow that it has no similarly impermissible "spillover" effect into projects not funded under the Act. As the Seventh Circuit noted here, the ordinance in *Milwaukee County* represented an attempt to supplant the NLRA by prescribing how employers must handle labor relations in all aspects of their business. Pet. App. 4a. By contrast, the Act "is concerned exclusively with how subsidized renewable fuels projects contract for labor," a project-specific condition. *Ibid.* Moreover, the Act's PLA requirement incorporates the NLRA's "tried and true" method for uninterrupted work, unlike the *Milwaukee County*'s labor peace agreement, which the NLRA does not recognize. Under these circumstances, the Seventh Circuit's view that the Act does not evince a desire to substitute the State's labor relations policy views for that of the NLRA does not conflict with *Milwaukee County*.

II. The Seventh Circuit's Mention of Federal Spending Cases Did Not Create a New Test for "Market Regulation" Under the NLRA.

Although petitioners themselves rely on cases that do not concern the NLRA (Pet. 8-9), they fault the Seventh Circuit's

mention of federal spending cases, which (they say) were used to invent "a new and erroneous test" for use of the government's spending power as a pretext for "market regulation" under the NLRA. Pet. 11-15. They are wrong.

The central problem with petitioners' argument is that the Seventh Circuit used *Dole*, *Rust*, and *Finley*, all of which upheld a condition on a federal grant, merely to illustrate its point: the Act's grant condition cannot be "market regulation" under *Boston Harbor* because it applies only to a funded project, just as a condition on federal funding that applies only to funded activities is constitutional. Pet. App. 3a-5a. This reasoning created no new test for NLRA preemption. On the contrary, it is fully consistent with *Boston Harbor*, which upheld the bid specification at issue there in part because it gave contractors a choice between continuing to do business with those who do not require PLAs or changing their usual mode of operation to obtain the work. 507 U.S. at 231.

III. Even if the Act Were "Market Regulation," the Result of This Case Would Be the Same.

Even "market regulation" is not preempted by the NLRA unless it falls with the scope of the *Garmon* or *Machinists* preemption doctrines. *Boston Harbor*, 507 U.S. at 226-27. The Act does neither. Thus, even if the Seventh Circuit erred in holding that the Act is not "market regulation," reversal on that point will make no difference in the outcome here, which is another ground for denying certiorari. *See* Stern, *supra*, §4.4, at 231.

Garmon preemption concerns government acts that interfere with the NLRA's integrated scheme of regulation of management and labor relations as embodied in Sections 7 and 8 of the NLRA. 29 U.S.C. §§ 157, 158 (Pet. App. 18-19a). Thus, it prohibits the government from regulating either the employee activities that Section 7 protects (even arguably) or

the labor practices that Section 8 prohibits (even arguably). 359 U.S. at 246, 244. *Garmon* held that the NLRA preempted a state court from awarding an employer damages for economic injuries when its employees peacefully picketed, on the ground that this state remedy was inconsistent with the NLRA's substantive remedial provisions. *Id.* at 246. In *Gould*, this Court relied on *Garmon* to hold that the NLRA preempted a Wisconsin law disqualifying vendors from doing business with the State for repeated violations of the NLRA, on the ground that the state law was an obvious means to compel compliance with the NLRA, as Wisconsin had admitted. 475 U.S. at 286-87.

Here, petitioners cannot show that the Act regulates activities that are arguably protected by Section 7 or constitute an unfair labor practice under Section 8. They have not identified any Section 7 activity that the Act impairs, and even a cursory reading of that provision reveals that it grants bargaining rights only to employ*ees*. 29 U.S.C. § 157. Thus, the Act cannot possibly violate Section 7 with regard to petitioners, who are employ*ers*. As for Section 8, it explicitly permits an employer in the construction industry to use a PLA. 29 U.S.C. § 158 (Pet. App. 18a-19a). Section 8's allowance of PLAs in the construction industry does not make this practice "protected" for *Garmon* purposes. *United Auto Workers v. Chao*, 325 F.3d 360, 363-64 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004). Accordingly, even if the Act's grant condition were "market regulation," it would not be preempted under *Garmon*, for it regulates neither employee bargaining rights that Section 7 protects nor labor practices that Section 8 prohibits as unfair.

Likewise, the Act would not be preempted under the *Machinists* doctrine, which prohibits the government from regulating the "self-help economic activities" that Congress intentionally left "to be controlled by the free play of economic

forces." 427 U.S. at 140, 147 (internal quotation marks omitted). Section 8 permits private employers in the construction industry to use PLAs (29 U.S.C. § 158 (Pet. App. 19a)), and as *Boston Harbor* cautioned, to prohibit a government entity from using a PLA if a private party could do so is antithetical to the free market concerns underlying the *Machinists* doctrine. 507 U.S. at 231. Plainly, the Act is not preempted under *Machinists*.

In sum, this Court has narrowly cabined the NRLA's preemptive scope to government *regulation*, and even then, only a regulation that acts within a zone that Congress protected and reserved for the NLRB's primary jurisdiction (*Garmon*) or for complete market freedom from all regulation of labor/ management relations (*Machinists*). The Seventh Circuit's finding that the Act's PLA requirement is not a regulation does not conflict with *Boston Harbor* and federal reviewing court opinions on NLRA preemption – the Act serves, and is tailored to, the State's interest in the efficient and effective use of a relatively small amount of money (at most $15,000,000 annually) for a few construction projects. Even if the Act were a regulation, it does not fall within the narrow scope of either *Garmon* or *Machinists* preemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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